Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 19 DECEMBER 11, 1985 No. 50

This issue contains:

U.S. Customs Service
T.D. 85-189 Through 85-191
General Notice
U.S. Court of International Trade
Slip Op. 85-116

AVAILABILITY OF BOUND VOLUMES

See inside back cover for ordering instructions

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

(T.D. 85–189)

Approval of Columbia Inspection, Inc., To Gauge Imported Petroleum and Petroleum Products in All Customs Districts

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval to gauge in all Customs districts.

SUMMARY: Pursuant to § 151.43, Customs Regulations (19 CFR 151.43), Columbia Insptection, Inc., was approved by Customs to gauge imported petroleum and petroleum products in the Customs Districts of Portland, OR, Seattle, WA, Houston, TX, and Los Angeles, CA on January 23, 1981. Notice of approval was published in the Federal Register as T.D. 81–20 on January 29, 1981 (46 FR 9844) and in the CUSTOMS BULLETIN of February 11, 1981. Recently, Columbia Inspection notified Customs that its area of operations had expanded, and requested that its approval be modified to include all Customs Districts. Since Columbia Inspection has complied with all requirements, Customs is granting this request.

Accordingly, Columbia Inspection, Inc., 7133 N. Lombard, Portland, Oregon 97203, is approved to gauge imported petroleum and petroleum products in all Customs Districts.

EFFECTIVE DATE: November 25, 1985.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, DC 20229 (202–566–2446).

Dated: November 25, 1985.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

(T.D. 85-190)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued August 12, 1985, to November 5, 1985, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and an approval under T.D. 84-49.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was forwarded or issued.

(DRA-1-09)

Dated: November 19, 1985.

File: 218401.

EDWARD B. GABLE, JR.
Director,
Carriers, Drawback and Bonds Division.

(A) Company: A. C. Monk and Co., Inc.
Articles: Flue-cured and burley scrap (strip) tobaccos; flue-cured and burley stems, and blended strip tobaccos
Mechandise: Unstemmed flue-cured and burley leaf tobaccos; flue-cured and burley strip (scrap) tobaccos
Factories: Farmville, NC; factories of agents
Statement signed: August 7, 1985
Basic of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: Miami, September 19, 1985

(B) Company: The BF Goodrich Company
Articles: Polymer chemicals
Merchandise: Beta-naphthol
Factories: Akron, and Avon Lake, OH; Henry, IL; Pedricktown, NJ; Louisville and Calvert City, KY; Plaquemine, LA; Long Beach, CA; Port Neches and Deer Park, TX
Statement signed: October 1, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), November 5, 1985

(C) Company: Borden, Inc., Borden Chemical Division
Articles: Polyvinyl chloride resins
Merchandise: Vinyl chloride monomer
Factories: Illiopolis, IL; Geismar, LA; Leominster, MA

Statement signed: July 31, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, October 23, 1985

(D) Company: Brush Wellman, Inc.
Articles: Beryllium-aluminum and beryllium-nickel alloys; beryllium ingots, power, sintered billets and machined shapes
Merchandise: High purity magnesium in various forms
Factory: Elmore, OH
Statement signed: September 16, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, October 29, 1985

(E) Company: Chemical Fabrics Corporation
Articles: PTFE coated woven fiberglass in roll goods, belts or sheet form
Merchandise: Polytetrafluoroethylene (PTFE) aqueous dispersions (Algoflon D–60G and Teflon T30B)
Factories: North Bennington, VT; Buffalo, NY; Schaumburg, IL
Statement signed: October 3, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Boston, October 22, 1985

(F) Company: Chevron Chemical Corporation
Articles: Lubricating oil additives
Merchandise: Isostearic polyamide
Factory: Belle Chasse, LA
Statement signed: June 17, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioners of Customs: New Orleans and Los Angeles (San Francisco Liquidation), September 18, 1985

(G) Company: Firestone Tire & Rubber Company
Articles: N–3 liquid adhesion promoter
Merchandise: Resorcinol
Factory: Gastonia, NC
Statement signed: June 3, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Miami, September 18, 1985

(H) Company: Formulabs Incorporated
Articles: Ball pen inks and marker pen inks
Merchandise: Coal tar dyes, pigments, polyvinylpyrrolidone resins; phenol mod. courmarone indene resin

Factory: Escondido, CA
Statement signed: August 21, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), September 9, 1985

(I) Company: Givaudan Corporation
Articles: Lilial crude for sales
Merchandise: Tertiary butyl benzaldehyde (TBB)
Factory: Clifton, NJ
Statement signed: April 23, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, October 3, 1985

(J) Company: Jones & Laughlin Steel Incoporated
Articles: Galvanized steel
Merchandise: Unwrought zinc
Factories: Hennepin, IL; East Chicago, IN
Statement signed: June 24, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), November 4, 1985

(K) Company: LNP Corporation
Articles: Fluorocomp® products; lubricated Thermocomp® products; fluorocarbon pellets and powder
Merchandise: PTFE fluorocarbon resin (polytetrafluoroethylene)
Factories: Thorndale, PA; Santa Ana, CA; Columbus, IN
Statement signed: May 29, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, August 12, 1985
Revokes: T.D. 83-16-M, to cover successorship from Beatrice Companies, Inc.

(L) Company: Merck & Co., Inc.
Articles: Adenine crude, intermediate/9/(2-chloro-6-fluorobenzyl)
Merchandise: Formamide technical; 2-dichloro-6-fluoro toluene; malononitrile
Factory: South Danville, PA
Statement signed: June 6, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, September 5, 1985
Revokes: T.D. 84-172-I

(M) Company: Mirrer's Warehouse Storage Co., Inc.

Articles: Polyethylene bags
Merchandise: Tubular polyethylene film
Factory: Houston, TX
Statement signed: March 12, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, October 8, 1985

(N) Company: Napp Systems (USA), Inc.
Articles: Letterpress printing plates
Merchandise: Tin free coil; electrolytic tin coil; aluminum coil, commercial grade and litho grade; chemicals
Factory: San Marcos, CA
Statement signed: April 24, 1985
Basis of claim: Used in, as to chemicals; used in, less valuable waste, as to metals
Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), November 5, 1985
Revokes: T.D. 84-172-J

(O) Company: Nashua Corporation
Articles: Diskettes; diskettes in jackets
Merchandise: Webstock media; disks; vinyl sheet
Factory: Nashua, NH
Statement signed: August 22, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, November 4, 1985

(P) Company: Patz Sales, Inc.
Articles: Agricultural machinery, such as, but not limited to, barn cleaners, silo unloaders, cattle feeders, tank spreaders, manure spreaders and stackers and material movers
Merchandise: Hot rolled steel sheet
Factory: Pound, WI
Statement signed: June 5, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in Accordance with section 191.25(b)(2), Customs Regulations: New York, September 3, 1985
Revokes: T.D. 78-254-Q, to cover name change from Patz Company

(Q) Company: Petro-Diamond Incorporated
Articles: "A" fuel oil
Merchandise: Diesel fuel, No. 2
Factory: Long Beach, CA
Statement signed: October 10, 1985
Basis of claim: Used in

Rate forwarded to Regional Commissioner of Customs: Los Angeles, November 4, 1985

(R) Company: Pfizer, Inc.
Articles: Sodium cefoperazone: lyophile/crystalline
Merchanise: Cefoperazone dihydrate
Factories: Terre Haute, IN; Brooklyn, NY; Bedford, OH
Statement signed: July 29, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, November 4, 1985

(S) Company: Philip Morris Incorporated
Articles: Cigarettes
Merchandise: Cigarette paper
Factories: Richmond, VA; Louisville, KY; Concord, NC
Statement signed: May 31, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, October 29, 1985
Revokes: T.D. 79-63-S

(T) Company: Polyvinyl/Permuthane Co.
Articles: Liquid resin solutions
Merchanise: Isophorone diisocyanate; tris (2-ethylhexyl) phosphate; isophornone diamine; hexanediol; ethylene carbonate; n-butyl acrylate and methyl methacrylate
Factory: Peabody, MA
Statement signed: October 23, 1984
Basis of claim: Used in
Rate forward to Regional Commissioner of Customs: New York, September 18, 1985

(U) Company: PPG Industries, Inc.
Articles: Isopropyl m-chlorocarbanilate
Merchandise: m-Chloroaniline
Factories: Barberton, OH; and factories of agents
Statement signed: July 15, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, October 4, 1985

(V) Company: Rohm and Haas Texas, Inc.
Articles: Plexiglas molding powder; acryloid modifiers; emulsions; acryloid solution coatings; acryloid solid coatings; monomer blends; oil additives
Merchandise: n-Butyl methacrylate
Factory: Deer Park, TX
Statement signed: October 26, 1984

Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), November 5, 1985

(W) Company: Shell Oil Company
Articles: Intermediate grade bunker fuels
Merchandise: Marine diesel fuel and marine fuel oil
Factories: Baltimore, MD; factories of agents
Statement signed: February 12, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Houston, September 18, 1985

(X) Company: Uniroyal, Inc.
Articles: Naugawhite
Merchandise: Paracresol
Factory: Naugatuck, CT
Statement signed: August 9, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, November 4, 1985

(Y) Company: The Upjohn Company
Articles: Cortical steroids
Merchandise: Diethyl oxalate
Factory: Kalamazoo, MI
Statement signed: June 24, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, October 22, 1985
Revokes: T.D. 79-213-Z

APPROVAL UNDER T.D. 84-49

(1) Company: Amoco Chemicals Corporation
Articles: Paraxylene; metaxylene; ethylene; propylene; polyethylene; polypropylene; styrene monomer; polystyrene; resin-18
Merchandise: Xylene; benzene; ethane; propane; light straight run gasoline; propylene
Factories: Decatur, AL; Torrance, CA; New Castle, DE; Joliet, and Willow Spring, IL; Alvin and Texas City (2), TX
Statement signed: August 29, 1985
Basis of claim: As provided in the drawback rate contained in T.D. 84-49
Rate forwarded to Regional Commissioner of Customs: Chicago, October 28, 1985
Revokes: T. D. 82-2-1

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19 CFR Part 18

[T.D. 85-191]

Customs Regulations Amendments Relating to Liquidated Damages Claims Against Bonded Carriers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to the liability of bonded carriers for shortages, irregular delivery, or nondelivery of imported merchandise. The purpose of the amendments is to assure uniform assessment of liquidated damages claims against carriers, as well as cartmen, for the shortage, irregular delivery, or nondelivery of bonded merchandise. The amendments will also further the protection of the revenue.

EFFECTIVE DATE: December 30, 1985.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: William Rosoff, Carriers, Drawback, and Bonds Division (202-566-2140). Operational Aspects: Kent Parsell, Inspection and Control Division (202-566-5354), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

By publication of T.D. 84-213 in the Federal Register on October 19, 1984 (49 FR 41152), the Customs Regulations (19 CFR Chapter I), were amended to revise the bond structure by consolidating and reducing the number of bond forms in use, to simplify transactions between Customs and the importing public, and to facilitate establishment of an efficient computerized bond control system.

Recent enforcement operations undertaken by Customs have indicated that the current liquidated damages provisions for failure to deliver in-bond cargo are insufficient to protect the revenue and actually contribute to a disregard of the in-bond regulations and procedures. One important element of the recently amended bond structure is an increase in the amounts chargable for failure to delivery bonded merchandise, to an amount equal to the value of the cargo (three times the value in the case of restricted merchandise or liquor). The amendment provides that these amounts control unless another amount is authorized elsewhere in the regulations.

Section 18.8, Customs Regulations (19 CFR 18.8), provides specific liability amounts assessable against bonded carriers for shortage, irregular delivery, or nondelivery of bonded merchandise. These amounts are widely variant from those provided in T.D. 84-213 and, due to the stipulation appearing in that amendment concern-

ing amounts otherwise authorized, are the amounts that are assessed in the event of a violation. Section 18.8 applies in the case of a violation by a bonded carrier. However, T.D. 84–213 is also applicable to bonded cartmen (one who transports goods or merchandise within the limits of a port). Thus, even though carriers and cartmen perform the same function, a disparity is created between their respective liabilities.

T.D. 84–213 stated that a complete review of the various regulatory provisions containing lesser liability amounts would be conducted (§ 18.8 among them), and that upon completion of that review, a proposal to modify any of the provisions would be published for public comment. However, due to an immediate need to ensure protection of the revenue as well as the equal treatment of all concerned parties, it was determined to propose amendments to § 18.8 in advance of completion of the study.

On January 11, 1985, a proposal was published in the Federal Register (50 FR 1545) to amend § 18.8(b), Customs Regulations (19 CFR 18.8(b)), by stating that carriers would be liable for the payment of liquidated damages under the carrier bond for any shortage, failure to deliver, or irregular delivery, as provided in the bond. The public was given until March 12, 1985, to submit comments on the proposal.

Discussion of Comments

Nine comments were received in response to the notice, all opposing the proposal. The following is a discussion of the issues raised and the Customs response.

It is stated that an effect of the change will be that the increase in liquidated damges amounts chargeable to the carrier will be too great and that the Congress intended duties on imported merchandise to be collected from the importer rather than from the carrier.

This is not entirely correct. Under § 448, Tariff Act of 1930, as amended (19 U.S.C. 1448(a)), the carrier who brings merchandise into the U.S. is liable for the payment of duties until unladen merchandise is properly released from Customs custody. That is, until the importer enters the merchandise and posts a bond guaranteeing the payment of duty, the carrier is liable. In any event, the commenters incorrectly assume that Customs is interested only in the collection of duties and that liquidated damages are substitute duties. Customs is interested in the collection of the correct duties, in preventing the importation of contraband, and in ensuring that merchandise is not released from our custody until it fully complies with the laws and regulations on admission or the importer has made an agreement, secured by a bond, to bring the merchandise into compliance. If the carrier loses the merchandise or delivers it to the importer before Customs has the opportunity to perform an examination, Customs loses the opportunity to accomplish those goals. The liquidated damages assessed under the bond is the con-

tractual amount which compensates the Government for those lost opportunities.

A commenter stated that the carrier at the destination should bear sole responsibility for compliance with all requirements at the final destination of the merchandise.

The carrier at the port of entry (the initial bonded carrier) has total control over subsequent transfers. Since 1925, under T.D. 40631, an initial bonded carrier has been allowed to turn over merchandise to a non-bonded carrier. However, the initial carrier would still be liable under the terms of its bond for any shortage or irregularity. If the initial bonded carrier wanted to limit its risk exposure, that carrier may state, on the immediate transportation entry, that it will only move the goods to the port where it is to relinquish possession to another carrier. The subsequent transfer under § 18.4, Customs Regulations (19 CFR 18.), would effectively limit the carrier's bond liability to the time that the carrier had actual possession. If, to gain business advantages, the carrier informs Customs that it will move the goods to the ultimate destination, Customs has no other choice but to hold that carrier responsible for the entire movement.

Another commenter noted that carriers are not always aware of the contents of shipments and so should not be held responsible for pilferage.

Generally, a carrier is responsible for shipments it transport. However, to the extent that a carrier properly delivers the merchandise to Customs at the port of destination and shows by reasonable evidence, such as maintaining seals on the containers that it did not lose any merchandise, it is unlikely that Customs would find that the carrier breached its bond obligations.

One commenter claimes that the intent of Congress in establishing duties on imported merchandise was to protect a fair market value.

The primary purposes of the Tariff Act of 1930 were to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the U.S., and to protect American labor. The assertion of the commenter is not supported by the statutory language.

It is claimed by one commenter that Customs is adequately protected against misdelivery of merchandise by the carrier's customer.

This claim would have validity if misdelivery were limited to delivery of merchandise to a party other than the ultimate owner or consignee. In this context, misdelivery is direct delivery by the carrier, having by-passed Customs in the process. The bonded carrier's agreement with Customs is that the carrier will notify Customs of the arrival of the merchandise so that Customs has an opportunity to examine and appraise the merchandise before it is delivered to the ultimate owner or consignee. The failure to keep that agree-

ment prevents Customs from fulfilling its mission which is to administer the Tariff Act of 1930, as amended. Primary responsibilty rests with Customs to assess and collect duties, taxes and fees on imported merchandise, to enforce and administer the Customs, navigation and related laws. Furthemore, as a major enforcement organization, customs combats smuggling and frauds on the revenue and enforces the law and regulations of numerous other Federal agencies throughout the country.

It is claimed that the amendment is illegal and will generate windfall revenue.

This contention lacks support. Under § 624, Tariff Act of 1930 (19 U.S.C. 1624), the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of 19 U.S.C. Chapter 4. Chapter 4 contains all of the provisions of the Tariff Act of 1930, as amended, including 19 U.S.C. 1552, 19 U.S.C. 1553, and 19 U.S.C. 1623. Under 19 U.S.C. 1552 and 19 U.S.C. 1553, the Secretary is authorized to make rules and regulations for the transportation of merchandise in bond before appraisement. Under 19 U.S.C. 1623, the Secretary is authorized to require bonds to protect the revenue or assure compliance with any provision of law which the Secretary may be authorized to enforce.

The claim is made that the payment of a claim for liquidated damages is simply another revenue source.

We disagree. If the carrier complies with its bond agreement, the bond obligation is void. A null and void bond obligation cannot constitute a source of revenue. On the other hand, if the carrier fails to honor its agreement to perform, it has damaged the Government by preventing it from performing the function for which it was established. Liquidated damages compensate the Government (on behalf of the people) for the damages suffered by the carrier's failure to live up to its obligation.

Another commenter states that the amendment will have an adverse, anticompetitive effect on bonded carriers.

There is no showing that the amendment will result in significantly increased bond premiums. Further, during public hearings on the question of removal of sureties, Customs was assured by each party who testified that bond premiums were insignificant or relatively modest. The anticompetitive effect claimed rest on the unsupported premise that all carriers are equally efficient and for that reason all carriers will breach their bond obligations proportionally. A small carrier who is more efficient and properly carries out its bond obligations will be unaffected by the proposal. There is no reason to assume that all carriers will breach their bonds.

It is alleged that in some cases it is not possible to prove to Customs that merchandise has been exported, so as to relieve liability under a bond.

We disagree with this allegation. It is normally possible to prove that merchandize has been exported. In support of the claim of ex-

portation, the carrier may submit various forms of documentary evidence, such as bills of lading, foreign landing certificates, vessel or vehicle manifests, certificates of lading, or certified notice of exportation.

Furthermore, no carrier is required to accept bonded merchandise. A bonded carrier does so only to gain a business advantage. With each advantage there is a element of risk. The carrier may not enjoy the business advantage without accepting any risk. The bonded carrier could reduce its exposure to risk by not undertaking the obligation to prove that the merchandise was exported. It has no basis for complaint when it fails to carry out the terms of its bond agreement.

Executive Order 12291

This is not a "major rule" as defined in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Act

Under the provisions of the Regulatory Flexibility Act (5 U.S.C. 301 *et seq.*), it is certified that these amendments will not have a significant economic impact on a substantial number of small entities.

Drafting Information

The prinicpal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 18

Common carriers, Freight forwarders, Motor carries, Surety bonds.

Amendments to the Regulations

Part 18, Customs Regulations (19 CFR 18), is amended as set forth below.

PART 18—TRANSPORTATION IN-BOND AND MERCHANDISE IN-TRANSIT

1. The general authority citation for Part 18 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1551, 1552, 1553, 1624: § 18.8 also issued under 19 U.S.C. 1623.

2. Section 18.8(b) is revised to read as follows:

§ 18.8 Liability for shortage, irregular delivery, or nondelivery; penalties.

(a) * * *

(b) Carriers shall be liable for payment of liquidated damages under the carriers bond for any shortage, failure to deliver, or irregular delivery, as provided in such bond.

3. Section 18.8(e)(1), second sentence, is amended by removing the word "computed" and the phrase "paragraphs (b)(1), (2) and (3) of."

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 12, 1985.

DAVID D. QUEEN,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, November 29, 1985 (50 FR 49037)]

U.S. Customs Service

General Notice

Delayed Effective Date of Country of Origin Marking Ruling Pertaining to Imported Orange Juice

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of delayed effective date of Customs Ruling No. 728557 pertaining to the country of origin marking requirements of retail packages of frozen concentrated orange juice and orange juice from concentrate.

SUMMARY: On September 4, 1985, the Customs Service ruled that retail packages of frozen concentrated orange juice and single-strength orange juice from concentrate, both of which are made from foreign orange juice concentrate for manufacturing, must be marked to indicate that the products contain foreign concentrate. The new requirements were to apply to all packages containing foreign concentrate entered for consumption or withdrawn from warehouse on or after January 1, 1986. The ruling was published in the CUSTOMS BULLETIN on September 25, 1985.

The Customs Service has received several requests on behalf of the orange juice industry to delay the effective date of the ruling until January 1, 1987. The requests are based on the claim that the processors need this additional time to comply with Customs change of policy in an orderly fashion that minimizes unnecessary expense. After careful consideration of the requests, we have decided to allow a 2 month extension of the effective date until March 1, 1986. While we recognize that this extension may not alleviate all of the economic impact of the ruling, we must also consider the right of the consumer under the marking statute to be advised of the country of origin of an imported product. We believe that the new effective date is a reasonable compromise.

EFFECTIVE DATE: The requirements of the Customs Ruling No. 728557 will apply to all packages containing foreign concentrate entered for consumption or withdrawn from warehouse on or after March 1, 1986.

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Entry, Licensing and Restricted Merchandise Branch, U.S. Cus-

toms, 1301 Constitution Avenue. NW., Washington, D.C. 20229 (202–566–5765).

DONALD W. LEWIS,
Director,
Entry Procedures and Penalties Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

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Nils A Boe

Clerk

Joseph E. Lombardi

Decision of the United States Court of International Trade

(Slip Op. 85-116)

NEC CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-7-00948

Before WATSON, *Judge.*

(Dated November 19, 1985)

Memorandum Opinion and Order of Dismissal

WATSON, *Judge:* This case is before the Court upon the motion of the defendant, United States, to dismiss for lack of jurisdiction, filed August 30, 1985, and the motion of the plaintiff, NEC Corporation, "to correct the filing date", filed September 30, 1985. Both motions pertain to the plaintiff's alleged failure to file the summons commencing this action within the time prescribed in 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 2636(c). Various other papers have since been submitted, which are accepted for filing and have been considered in deciding these motions.

In this action, plaintiff seeks to contest the final results of the Commerce Department's administrative review of an antidumping finding, pursuant to 19 U.S.C. § 1675(a), in the matter of *Television Receiving Sets, Monochrome and Color, from Japan.* Notice of the decision was published in the Federal Register on June 10, 1985. 50 Fed. Reg. 24278. This Court has exclusive jurisdiction to review such administrative determinations pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). The applicable time limits for the filing of a summons and complaint in such an action are set forth in 19 U.S.C. § 1516a(a)(2)(A) as follows:

> * * * Within thirty days after
> (i) the date of publication in the Federal Register of—
> (I) notice of any determination described in clause * * *
> (iii) * * * of subparagraph (B) * * *
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons and within thirty days thereafter a com-

> plaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

Those time limits are expressly made jurisdictional under 28 U.S.C. § 2636(c), which states:

> A civil action contesting a reviewable determination listed in [19 U.S.C. § 1516a] is barred unless commenced in accordance with the rules of the Court of International Trade within the time specified in such section.

In this case, it is undisputed that plaintiff's counsel sought to post by certified mail an envelope addressed to the clerk containing the summons on July 8, 1985, but the envelope was returned to plaintiff's counsel on July 15, 1985 with the notation "insufficient postage." Counsel thereupon remailed the envelope with proper postage. Upon receipt thereof, the clerk deemed the summons as having been filed on the latter mailing date, July 15, 1985, pursuant to Rule 5(g) of this Court.

Defendant contends that this action is time-barred because the plaintiff failed to file the summons in this Court within thirty days after publication of the Commerce Department's administrative determination in the Federal Register on June 10, 1985. Plaintiff does not dispute that if the clerk properly assigned the filing date of July 15, 1985 to the summons then the action must be dismissed as untimely. *See generally Royal Business Machines, Inc.*, v. *United States*, 669 F.2d 692, 702 (C.C.P.A. 1982). Plaintiff argues, however, that the clerk should have treated the summons as having been filed on July 8, 1985, the date plaintiff attempted to send the summons by certified mail with insufficient postage.

Both 19 U.S.C. § 1516a(a)(2)(A) and 28 U.S.C. § 2636(c) make reference to the Rules of the Court of International Trade for determining whether the applicable filing deadlines were met. The rule governing filing dates is Rule 5(g), which states:

> *Service and Filing—When Completed.* Service or filing of any pleading or other paper by delivery or by mailing is completed when received, except that a pleading or other paper mailed by registered or certified mail properly addressed to the party to be served, or to the clerk of the court, *with the proper postage affixed* and return receipt requested, shall be deemed served or filed as of the date of mailing. (emphasis added).

Plaintiff's position that the original certified mailing on July 8, 1985 completed the filing of the summons, despite insufficient postage, is indeed difficult to square with the language of Rule 5(g). If the rule merely stated that service or filing is complete as of the date of mailing by certified mail, plaintiff might have some basis for arguing that prepayment of proper postage was not essential. However, the date-of-mailing exception in Rule 5(g) expressly re-

quires certified mailing "with the proper postage affixed." By failing to affix sufficient postage to the summons, plaintiff failed to fulfill an explicit condition under Rule 5(g) for date-of-mailing filing.

Plaintiff suggests that the Court inserted the requirement of proper postage in Rule 5(g) merely for "administrative convenience." This suggestion is without basis or merit. As plaintiff acknowledges, postal service guidelines do not require delivery to the addressee of mail with insufficient postage. *See* U.S. Postal Service Domestic Mail Manual, Section 146.13, Insufficient Payment. In this case, in fact, plaintiff's July 8, 1985 certified mailing was never delivered to the clerk, but instead was returned to plaintiff's counsel with the notation "insufficient postage." Hence, the requirement of proper postage clearly serves the fundamental purpose of ensuring that the item sent will be delivered to the addressee.

Prior decisions of this Court afford no support for plaintiff's novel construction of Rule 5(g). Although apparently no case has involved a summons which was not timely filed due to insufficient postage, in *Jernberg Forgings Co.* v. *United States*, Slip Op. 84–17 (March 8, 1984), *vacated*, Order (April 26, 1985), the Court was faced with a timely-filed summons followed by a complaint which was not timely filed due to insufficient postage. In that case, plaintiffs' initial unsuccessful mailing of the complaint—like the unsuccessful mailing of the summons in this case—had occurred within the applicable time limit prescribed in 19 U.S.C. § 1516a(a)(2)(A). The Court, nevertheless, found that plaintiffs failed to file their complaint within the prescribed period because the subsequent mailing with proper postage occurred after the period elapsed. The Court, however, granted plaintiffs' motion for leave to file their complaint out of time, reasoning that under the language of former-28 U.S.C. § 2636(c)[1] and Rule 3(a) of this Court, only the thirty-day limit for filing the summons was jurisdictional; the requirement in 19 U.S.C. § 1516(a)(2)(A) that the complaint be filed within thirty days thereafter was merely a "procedural detail", the breach of which could be excused for good cause.

Needless to say, nothing in *Jernberg* or cases following it [2] suggest that under Rule 5(g) the clerk should treat documents not received by the Court, but instead returned to the sending party because of insufficient postage, as having been filed on the date of the

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[1] At the time of the *Jernberg* decision, 28 U.S.C. § 2636(c) read as follows:

> A civil action contesting a reviewable determination listed in [19 U.S.C. § 1516a] * * * is barred unless commenced in accordance with the Rules of the Court of International Trade within thirty days after the date of the publication of such determination in the Federal Register.

The amended version of this subsection, quoted *ante*, p. 2, applies to all cases pending on, or filed on or after, October 30, 1984. Pub. L. 95–573, Title VI, § 623(b)(1), 626(b)(2), October 30, 1984, 98 Stat. 3041, 3042.

[2] In *Continental Steel Corp.* v. *United States*, Court No. 84–05–00728, Order (September 25, 1984), this Court, without opinion, denied defendant's motion to dismiss and granted plaintiffs' motion for leave to file their complaints out of time. As in *Jernberg*, the summons had been timely filed, but the complaints were untimely due to insufficient postage.

The language and reasoning of *Jernberg* were recently followed in *Lone Star Steel Co.* v. *United States*, Slip Op. 85–61 (June 7, 1985), *vacated*, Order (July 30, 1985). The Court, however, quoted the previous version of 28 U.S.C. § 2636(c), and apparently was unaware of the October 30, 1984 amendment.

unsuccessful certified mailing. To the contrary, the Court found in those cases that the complaints were not filed until the date of the subsequent successful though untimely mailing, and the Court gave plaintiffs leave to file their complaints out of time. No such leave is possible in this case where the summons was not timely filed, since the thirty-day limit for filing the summons is unquestionably jurisdictional.

Because Rule 5(g) expressly requires proper postage for date-of-mailing filing, and because without proper postage there is no assurance that mail will be delivered to the addressee, the Court holds that by failing to affix sufficient postage to the summons on July 8, 1985, plaintiff's counsel failed to fulfill an essential requirement for date-of-mailing filing. The clerk, therefore, properly deemed the summons as having been filed on July 15, 1985, the date plaintiff's counsel mailed the summons with sufficient postage.

Plaintiff emphasizes that counsel's failure on July 8, 1985 to affix sufficient postage to the envelope containing the summons addressed to the clerk was a good faith mistake committed by clerical personnel,[3] and that return receipts indicate that plaintiff timely served copies of the summons upon all interested parties. The jurisdictional nature of the thirty-day filing requirement, however, renders such concerns irrelevant. Even accepting that plaintiffs' counsel acted in good faith and that no party has been prejudiced, plaintiff's untimely filing of the summons in this Court, of itself, requires that this case be dismissed.

For the foregoing reasons, it is ORDERED:

1. That plaintiff's motion to correct the filing date of the summons in this action is hereby denied.
2. That defendant's motion to dismiss is hereby granted.
3. That this action is hereby dismissed for lack of jurisdiction.

[3] Plaintiff's counsel indicates that the envelope containing the summons was mailed simultaneously with copies addressed to the interested parties. The person handling the mailing apparently weighed an envelope addressed to one of the interested parties and assumed that each of the envelopes, including the one addressed to this Court, weighed the same. The envelope addressed to the Court, unfortunately, contained more papers and required greater postage.

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Index

U.S. Customs Service

Treasury Decisions

	T.D. No.
Bonded carriers, liquidated damages claims, Part 18, CR amended	85-191
Drawback decisions, synopses of:	
Companies:	
A. C. Monk and Co., Inc	85-190-A
Amoco Chemicals Corp	85-190-1
The BF Goodrich Co	85-190-B
Borden, Inc	85-190-C
Brush Wellman, Inc	85-190-D
Chemical Fabrics Corp	85-190-E
Chevron Chemical Corp	85-190-F
Firestone Tire & Rubber Co	85-190-G
Formulabs Inc	85-190-H
Givaudan Corp	85-190-I
Jones & Laughlin Steel Inc	85-190-J
LNP Corp	85-190-K
Merck & Co., Inc	85-190-L
Mirrer's Warehouse Storage Co., Inc	85-190-M
Napp Systems (USA), Inc	85-190-N
Nashua Corp	85-190-O
Patz Sales, Inc	85-190-P
Petro-Diamond Inc	85-190-Q
Pfizer, Inc	85-190-R
Philip Morris Inc	85-190-S
Polyvinyl/Permuthane Co	85-190-T
PPG Industries, Inc	85-190-U
Rohm and Haas Texas, Inc	85-190-V
Shell Oil Co	85-190-W
Uniroyal, Inc	85-190-X
The Upjohn Co	85-190-Y
Merchandise:	
Beta naphthol	85-190-B
Butyl benzaldehyde	85-190-I
Butyl methacrylate	85-190-V
Cefoperazone dihydrate	85-190-R
Chloroaniline	85-190-U
Cigarette paper	85-190-S
Coal tar dyes	85-190-H
Diesel fuel	85-190-Q

Drawback decisions, synopses of—Continued
Merchandise—Continued T.D. No.
Diethyl oxalate 85–190–Y
Disks 85–190–O
Formamide technical 85–190–L
Fuel oil 85–190–W
Isophorone diisocyanate 85–190–T
Isostearic polyamide 85–190–F
Magnesium 85–190–D
Paracresol 85–190–X
Polyethylene film 85–190–M
Polytetrafluoroethylene aqueous dispersions 85–190–E
Polytetrafluoroethylene fluorocarbon resin 85–190–K
Resorcinol 85–190–G
Steel sheet 85–190–P
Tin free coil 85–190–N
Tobaccos, leaf, flue-cured, unstemmed 85–190–A
Vinyl chloride monomer 85–190–C
Xylene 85–190–1
Zinc 85–190–J
Public gauger, approval of, Columbia Inspection, Inc 85–189

U.S. Court of International Trade

Slip Op. No.
NEC Corp. *v.* United States 85–116

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